Supreme Court, U.S.
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NO. 94-987

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

WMX TECHNOLOGIES, INC., WMI WASTE MANAGEMENT OF CANADA, INC., WASTE MANAGEMENT OF MICHIGAN, INC.,

Petitioners,

v.

CANADIAN GENERAL INSURANCE COMPANY, COMMERCIAL UNION ASSURANCE COMPANY OF CANADA, ROYAL INSURANCE COMPANY OF CANADA, WELLINGTON INSURANCE COMPANY, AND AUTO-OWNERS INSURANCE COMPANY,

Respondents.

On Petition For a Writ of Certiorari to the New Jersey Supreme Court

BRIEF IN OPPOSITION

Mr. Ronald J. Levine
(Counsel of Record)
HERRICK, FEINSTEIN
Attorneys for Respondent
Commercial Union Assurance Company of Canada
104 Carnegie Center
Princeton, NJ 08540-6232
(609) 426-9400

Mr. John R. Casolaro
Of Counsel for Respondent
Canadian General Insurance Company
CARTER, LEDYARD & & MILBURN
2 Wall Street
New York, NY 10005

Mr. William P. Krauss
Of Counsel for Respondent
Royal Insurance Company of Canada
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
One Gateway Center
Newark, NJ 07102

Mr. Eric Proshansky
Of Counsel for Respondent
Wellington Insurance Company
TENZER, GREENBLATT, FALLON & KAPLAN
405 Lexington Avenue
New York, NY 10174

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COUNTER-STATEMENT OF QUESTION PRESENTED:

Whether the New Jersey Supreme Court properly dismissed four Canadian insurers from a New Jersey declaratory proceeding on the basis of lack of in personam jurisdiction when there was no factual connection between the insurers and the State of New Jersey and the subject matter of the New Jersey declaratory claims against those insurers had no factual connection with New Jersey.

RULE 29.1 LISTING

Pursuant to Rule 29.1, the following is a list of all parent companies and subsidiaries (except wholly owned subsidiaries) of the following Respondents: respondent Canadian General Insurance Company: Canadian Insurance Shares Limited, Traders General Insurance Company, Scottish & York Insurance Co. Limited, Victoria Insurance Company of Canada, Central Canada Insurance Service Limited, Trade-Line Restoration Inc., and Provinco Financing Canada Limited; respondent Commercial Union Assurance Company of Canada: Commercial Union of Canada Holdings Ltd.; respondent Royal Insurance Company of Canada: Royal Insurance plc.; and respondent Wellington Insurance Company: The London Insurance Group.

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COUNTER-STATEMENT OF THE CASE

I. The Factual Circumstances of the Parties and the Claim Asserted Against Waste Management of Canada

Respondents Canadian General Insurance Company, Commercial Union Assurance Company of Canada, Royal Insurance Company of Canada and Wellington Insurance Company (hereinafter collectively "the Canadian Insurers") are Canadian insurance companies doing business in Canada. The Canadian Insurers conduct no business in the United States and have no assets or property of any kind located in the United States. They are not licensed to insure risks or otherwise do business in the United States and maintain no telephone listing or bank accounts here. The Canadian Insurers have no employees or agents in the State of New Jersey and do not advertise, solicit or sell insurance in New Jersey.

Petitioner WMI Waste Management of Canada (hereinafter "WM of Canada")[1] is a Canadian company that is not licensed to do business in the State of New Jersey. WM of Canada is the only plaintiff in this action seeking coverage against the Canadian Insurers. WM of Canada, including several subsidiaries and predecessor entities, purchased the policies allegedly issued by the Canadian

[1] The alleged insurance policies issued by Canadian General Insurance Company, Commercial Union Assurance Company of Canada and Royal Insurance Company of Canada provide coverage to WM of Canada or one of its subsidiaries or predecessor companies. Some of the Fireman's Fund of Canada (Wellington) policies also name Waste Management, Inc. (now known as WMX Technologies, Inc.), as an "additional named insured." This was a routine industry practice intended to provide WMX Technologies with certain limited coverage only with respect to the liability arising out of the operations of York Sanitation.

Insurers that are the subject of this action through Canadian insurance brokers for WM of Canada's operations (disposal sites, plants or garages) located in Canada. The Canadian insurance policies at issue make no reference to offices of a policyholder anywhere in the United States; to the contrary, the Canadian Insurers issued their respective policies only after ascertaining that WM of Canada or its predecessor entities conducted operations solely in Canada. In addition, the policies were purchased with Canadian dollars. The policies were signed, issued and delivered exclusively in Canada between the Canadian Insurers and WM of Canada or its predecessor companies.

WM of Canada brought this declaratory-judgment action against the Canadian Insurers to obtain insurance coverage for WM of Canada's potential liability in a Canadian lawsuit entitled Gullo Enterprises, Ltd. v. WMI Waste Management of Canada, Inc., pending in the Supreme Court of Ontario. In this Canadian suit, WM of Canada is claimed to have contaminated adjacent property through the operation of a landfill it owns in Ontario. WM of Canada is the only defendant in the Canadian suit.

II. The Trial Court Opinion

WM of Canada petitions this Court to adopt the reasoning of the trial court opinion denying the Canadian Insurers' motion to dismiss for lack of jurisdiction. The trial court concluded that a "territory of coverage" clause found in the policies of each of the Canadian Insurers, in and of itself, was a sufficient basis on which to find in personam jurisdiction over the Canadian Insurers. The trial court also found that New Jersey has an "interest nexus" in resolving large insurance cases sufficient to confer personal jurisdiction over the Canadian Insurers despite the lack of any factual ties to New Jersey, i.e., absent minimum contacts.

III. The Decision Of The New Jersey Supreme Court

On interlocutory appeal the New Jersey Supreme Court, in a unanimous decision, reversed the trial court. The New Jersey Supreme Court began its analysis by recounting the absence of any contact between the Canadian Insurers, WM of Canada, and New Jersey. After restating fundamental propositions of in personam jurisdiction, including relevant due-process considerations, the New Jersey Supreme Court ruled that the Canadian Insurers had no contacts with New Jersey other than the "territory of coverage" clause contained in the insurance policies of the Canadian Insurers. The New Jersey Supreme Court concluded:

> We hold that in the absence of a forum-related event, a "territory of coverage" clause alone does not create a sufficient basis on which to rest jurisdiction in this state. See, e.g., Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 913-4 (9th Cir. 1990); Rossman v. State Farm Mut. Auto Ins. Co., 832 F.2d 282, 286 (4th Cir. 1987); Commonwealth of Puerto Rico v. The SS Zoe Colocotroni, 628 F.2d 652, 668 (1st Cir. 1980); Batton v. Tennessee Farmers Mut. Ins. Co., 736 P.2d 2, 6 (Ariz. 1987); Meyer v. Auto Club Ins. Ass'n, 492 So.2d 1314, 1316 (Fla. 1986); Guardian Royal Exch.

Assurance v. English China Clays, P.L.C., 815 S.W. 2d 223, 227 (Tex. 1991).

Waste Management Inc. v. Admiral Ins. Co., 138 N.J. 106, 127, 649 A.2d 379, 389 (N.J. 1994).

While recognizing the trend to expand the scope of jurisdiction over non-residents and the special interest that a state may have in the field of insurance, the New Jersey Supreme Court held that neither of these circumstances justified eliminating the minimal due process requirement that the defendant create minimum contacts with New Jersey by purposely availing itself of some benefit of doing business in the state. It concluded that "[b]ecause no contacts exist between New Jersey and the Canadian Insurers, these defendants cannot be made subject to this State's personal jurisdiction." Id.

The New Jersey Supreme Court concluded its analysis by briefly addressing the trial court's alternative holding based on New Jersey's "interest nexus." The trial court's attempt to support its opinion by reference to the decision of Ashley v. Abbott Laboratories, 789 F. Supp. 552 (E.D.N.Y. 1992) was found to be misplaced because of distinguishable facts and, most significantly, because the novel jurisdictional tests crafted in the Ashley decision rested largely on the existence of a uniform, mass tort which would have gone unredressed without modification of conventional jurisdictional principles.

Finally, the New Jersey Supreme Court rejected the trial court's reference to New Jersey's asserted interest in hosting this foreign insurance dispute on the basis that it would avoid "fractionalization" of this massive declaratory action. The New Jersey Supreme Court found that due-process analysis focuses "principally on substantial justice

and fundamental fairness, not on economy and convenience." Waste Management Inc. v. Admiral Ins. Co., 138 N.J. at 131, 649 A.2d at 391.

REASONS FOR DENYING THE WRIT

POINT I: THE INSURANCE CONTRACTS AT ISSUE IN THIS ACTION ARE INSUFFICIENT MINIMUM CONTACTS UNDER BURGER KING

Petitioners recognize that the contacts, if any, that do exist between New Jersey and the Canadian Insurers arise out of a contractual relationship. ("Respondents' promises to perform insurance services in New Jersey constitute. . . minimum contacts with New Jersey. . . ."). Petition for a Writ of Certiorari to the New Jersey Supreme Court ("Pet. Cert.") at 14. Petitioners' argument does not, however, include an analysis of a territory of coverage clause in terms of this Court's precedents to determine whether such a clause could give rise to a jurisdictionally significant contact.

Clearly it could not. The New Jersey Supreme Court's holding that "a 'territory of coverage' clause alone does not create a sufficient basis on which to rest jurisdiction in this state," 138 N.J. at 127, 649 A.2d at 389, accords with this Court's position that: "If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478, 105 S.Ct. 2174, 2185 (1985)(original emphasis).

If a contract entered into with a forum resident, without more, is an insufficient jurisdictional predicate, then a contract, without more, entered into with a non-resident of the forum is still less adequate. The insurance contracts at issue are between the Canadian Insurers and Canadian insureds.

It is the negotiations, the contemplated future consequences of the contract and the parties' course of dealing that determine whether a contracting party sufficiently availed itself of a forum so as to require a defense in that forum. Burger King, 471 U.S. at 479, 105 S.Ct. at 2185. The Canadian Insurers entered into insurance contracts with an Ontario resident; neither the negotiations nor the parties' subsequent course of dealing touched upon New Jersey in any manner. As a Canadian land-fill operation with no known operations outside of Canada, the contemplated future consequences of the contract in New Jersey -- if any -- would have been so attenuated as to have been insignificant for jurisdictional purposes. See World Wide Volkswagen v. Woodson, 444 U.S. 286, 299, 100 S.Ct. 559, 568 (1980).

Petitioners place considerable reliance on the argument that the commercial benefit flowing from a nationwide territory of coverage clause creates a basis for nationwide jurisdiction. Pet. Cert. at 14. The same logic was rejected in World Wide Volkswagen, 444 U.S. at 289, 105 S.Ct. at 563. The plaintiff there argued that Oklahoma jurisdiction over a New York Volkswagen dealer could be founded on the chain of Volkswagen service centers located throughout the United States. Those centers comprised, according to the plaintiff, a commercial benefit sufficient to indicate the dealer's purposeful availment of the forum. Id.

A nationwide chain of service centers is closely analagous to the "nationwide promise of insurance services" posited by Petitioners as a contact created by a territory of coverage clause. In World Wide Volkswagen, this Court rejected a contact of this nature as too attenuated to support a finding of jurisdiction, a holding which should govern here. Id.

A. There Is No "Split" Of Authority On The Issue That A Territory Of Coverage Clause Alone Is Not A Basis For Jurisdiction

Petitioners' principal argument for a grant of certiorari is premised on a fictional "split between federal circuit courts and state supreme courts." Pet. Cert. at 13. This fictional split of authority is manufactured by artful selection among decisions that consider in a variety of circumstances whether a territory of coverage clause provides a basis for personal jurisdiction. Petitioners claim that a so-called territory of coverage rule "has been accepted" by the majority of federal courts. Pet. Cert. at 11.[2] In purported contrast, State courts "have rejected the exercise of personal jurisdiction on the basis of territory of coverage clauses." Pet. Cert. at 12.[3]

The cited decisions do not, in fact, even address the issue in the present case. The New Jersey Supreme Court framed the issue at hand when describing the trial court "as the only court in this or any other jurisdiction to declare that a territory of coverage clause in an insurance policy, standing alone, confers jurisdiction over an alien insurer." Waste Management Inc. v. Admiral Ins. Co., 138 N.J. at 116, 649 A.2d at 384 (emphasis added).

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[2]Petitioners cite Payne v. Motorists Mutual Ins. Co., 4 F.3d 452 (6th Cir. 1993); Farmers Ins. Co. v. La Prairie Mutual Ins. Co., 907 F.2d 911 (9th Cir. 1990); Rossman v. State Farm Automobile Ins. Co., 832 F.2d 282 (4th Cir. 1987); and Commonwealth of Puerto Rico v. The SS Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980).

[3]Petitioners cite Batton v. Tennessee Farmers Mutual Insurance Co., 736 P.2d 2 (Ariz. 1987); Meyer v. Auto Club Insurance Ass'n, 492 So.2d 1314 (Fla. 1986); and Marsh v. Farm Bureau Mutual Insurance Co., 505 N.W.2d 162 (Wis. App. 1993).

In every decision cited by Petitioners, there was, in addition to a territory of coverage clause, a significant forum contact by the insurer, typically an auto accident in the forum. That accident in turn gave rise to a coverage dispute between insured and insurer, in the same forum. The assertion of jurisdiction in many of these cases was founded on the fact that: 1) the insured-against event was foreseeable; 2) the insurer's actual provision of defense and indemnity in the forum demonstrated purposeful availment of the forum; and 3) the coverage dispute arose out of the forum contact, i.e. the insurer's provision of defense and indemnity in the forum. See Note 2, p. 7, supra.

Having looked to inapposite cases, Petitioners compound the confusion by structuring an argument on decisions that do not construe a consistent set of facts. A true judicial "split" is created when courts reach different legal results despite applying the same facts. Petitioners fail to present a true split, because the state and federal decisions which they compare are premised on different facts.

In the state decisions (See Note 3, p. 7, supra), the insured-against event occurred in the forum state, but the plaintiff-insured was not a resident of that state and the courts refused to assert personal jurisdiction over the insurer in the subsequent coverage dispute. By contrast, in three of the four federal cases cited by Petitioners, the insured-against event also occurred in the forum state, but the plaintiff was a resident of the forum, and the courts, therefore, found that an assertion of jurisdiction was proper. It is residency and its effect on the issue of purposeful availment that was dispositive in these cases.

Moreover, Petitioners' purported federal-state split in authority ignores the many federal cases in which jurisdiction

is declined absent a forum-related event[4] and the many state cases where a territory of coverage provision does serve as a basis for jurisdiction, in conjunction with a forum-related event.[5]

B. The New Jersey Supreme Court Rejected Consent as a Basis for Jurisdiction in this Instance

Finally, Petitioners' contention that the New Jersey Supreme Court did not address whether a territory of coverage clause amounted to constructive consent to jurisdiction is less than accurate. Pet. Cert. at 19. The New Jersey Supreme Court referred to actions that may constitute constructive consent, citing the same decisions as Petitioners cited. The Court then noted that, "however, not every act of a potential defendant is sufficient to satisfy the jurisdictional requirement of intentional availment." 138 N.J. at 127, 649 A.2d at 389. Even under the rubric of "consent", a territory of coverage provision was deemed to be too attenuated to serve as a basis for jurisdiction.

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[4]Davis v. American Family Mutual Ins. Co., 861 F.2d 1159 (9th Cir. 1988); Rambo v. American Southern Ins. Co., 839 F.2d 1415 (10th Cir. 1988); Travelers Indemnity Co. v. Calvert Fire Ins. Co., 798 F.2d 826 (5th Cir. 1986); Hunt v. Erie Ins. Group, 768 F.2d 1244 (9th Cir. 1984); Magnus Maritec Int'l, Inc. v. The SS Panteleimon, 444 F. Supp. 567 (S.D. Tex. 1978).

[5]Szalay v. Handcock, 819 S.W.2d 684 (Ark. 1991); Guardian Royal Exchange Assurance, Ltd. v. English China Clays P.L.C., 815 S.W.2d 223 (Tex. 1991); New Jersey Full Ins. Underwriting Assoc. v. Independent Ins. Co., 600 A.2d 1243 (N.J. Super. 1991).

POINT II: THERE IS NO CONFLICT BETWEEN THE NEW JERSEY SUPREME COURT'S DECISION AND THE ASHLEY DECISION

Contrary to Petitioners' suggestion, the Eastern District of New York's decision in Ashley v. Abbott Laboratories, 789 F. Supp. 552 (E.D.N.Y. 1992) ("Ashley") does not conflict with the New Jersey Supreme Court's decision in the present case with regard to the appropriate due process analysis for "complex, multi-party" litigation.

The "interest" based test in Ashley was premised on the existence of a uniform tort involving a uniform mechanism of injury. Id. at 557. In contrast, the instant case is an insurance declaratory judgment action in which each insurer's liability "will be governed by the specific terms of its own contracts of insurance." Waste Management Inc. v. Admiral Ins. Co., 138 N.J. at 130, 649 A.2d at 390.

Furthermore, Ashley's extraordinarily relaxed jurisdictional formulation was developed in response to the adoption of the "market share" theory of liability by the New York Court of Appeals in Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069, cert. denied, 493 U.S. 944, 110 S.Ct. 350 (1989). According to the "market share" theory, liability was assessed against DES manufacturers according to each manufacturer's share of the national market. In contrast to the present case, under the market share theory, a plaintiff's recovery would be frustrated if all manufacturers could not be brought into the same court. Id. Moreover, no forum outside New York embraced the "market share" theory of liability. "Other, perhaps even more appropriate forums" were not available to the plaintiffs in the Ashley case. Waste Management Inc. v. Admiral Ins. Co., 138 N.J. at 130, 649 A.2d at 390. The

most appropriate forum for the Canadian plaintiff in the present case is Canada, which is of course available.

Unlike New York in Ashley, New Jersey has no interest in the Canadian Insurers' contracts. No New Jersey plaintiff is seeking coverage from the Canadian Insurers. No New Jersey landfill is covered by the Canadian Insurers' contracts. New Jersey has no interest in the outcome of this action, which will determine whether a Canadian insured or a Canadian insurer must pay for the clean up of land located in Canada and owned by Canadians.

Moreover, as the New Jersey Supreme Court recognized, Ashley "was limited strictly to actions brought by New York plaintiffs for injuries occurring in New York." Id. The Ashley interest based test would not be available to a Canadian plaintiff suing in New Jersey for coverage of a Canadian site.

Finally, the Ashley court premised its rejection of the traditional "minimum contacts" analysis on the fact that the nonresident DES manufacturers participated in a national market from which they derived some benefit. Therefore, the defendants in the Ashley case could "reasonably expect" that the sale of DES in New York would have "some consequences" in that state. Id. at 570. See also Phillips Petroleum v. Shutts, 472 U.S. 797, 808, 105 S. Ct. 2965, 2972 (1985) (a state "should not be able to exert jurisdiction over the plaintiffs' claims unless the plaintiffs have sufficient minimum contacts" with that state). In contrast, the Canadian Insurers had no reason to foresee that a contract to insure a Canadian company for a Canadian site would require them to defend a suit in a New Jersey court.

POINT III: PETITIONERS' SUGGESTION THAT THIS COURT'S PERSONAL JURISDICTION HOLDINGS ARE CONFUSED AND REQUIRE CLARIFICATION LACKS MERIT

Petitioners' claim that there is confusion as to whether this Court's holdings in Burnham v. Superior Court, 495 U.S. 604, 110 S.Ct. 2105 (1990) and Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099 (1982) are consistent and that these cases do not fully explain the balancing of personal liberty interests and sovereignty interests required when considering the assertion of personal jurisdiction. Petitioners fail to point to any court decision which shares this alleged confusion. The reason is that no real confusion exists.

The relatively minor debate to which Petitioners refer was resolved in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, supra, where this Court noted in a footnote that personal jurisdiction is a function, ultimately, of the liberty interest preserved by the Due Process Clause. 456 U.S. 702-03 n.10. If the sovereign power of a court were to control personal jurisdiction, it would not be possible to waive personal jurisdiction. Id.

The conflict seen by the treatise writers cited by Petitioners either predates this Court's personal jurisdiction decisions in Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), Asahi Metal Ind. Co. v. Superior Ct., 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) and Burnham v. Superior Court, or relates to cases involving products placed in the stream of commerce and have no applicability to the facts herein.

CONCLUSION AND RELIEF REQUESTED

The Petition for Writ of Certiorari should be denied. The New Jersey Supreme Court was correct in its

determination that the action against the Canadian Insurers should be dismissed since the Canadian Insurers and the Petitioners' claim against them have no connection with New Jersey.

Respectfully submitted,

Mr. Ronald J. Levine
(Counsel of Record)
HERRICK, FEINSTEIN
Attorneys for Respondent
Commercial Union Assurance Company of Canada
104 Carnegie Center
Princeton, New Jersey 08540-6232
(609) 426-9400

Mr. John R. Casolaro
Of Counsel for Respondent
Canadian General Insurance Company
CARTER, LEDYARD & MILBURN
2 Wall Street
New York, New York 10005
(212) 732-3200

Mr. William P. Krauss
Of Counsel for Respondent
Royal Insurance Company of Canada
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
One Gateway Center
Suite 1600
Newark, New Jersey 07102
(201) 624-0800

Mr. Eric Proshansky
Of Counsel for Respondent
Wellington Insurance Company
TENZER, GREENBLATT, FALLON & KAPLAN
405 Lexington Avenue
New York, New York 10174
(212) 573-4300

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